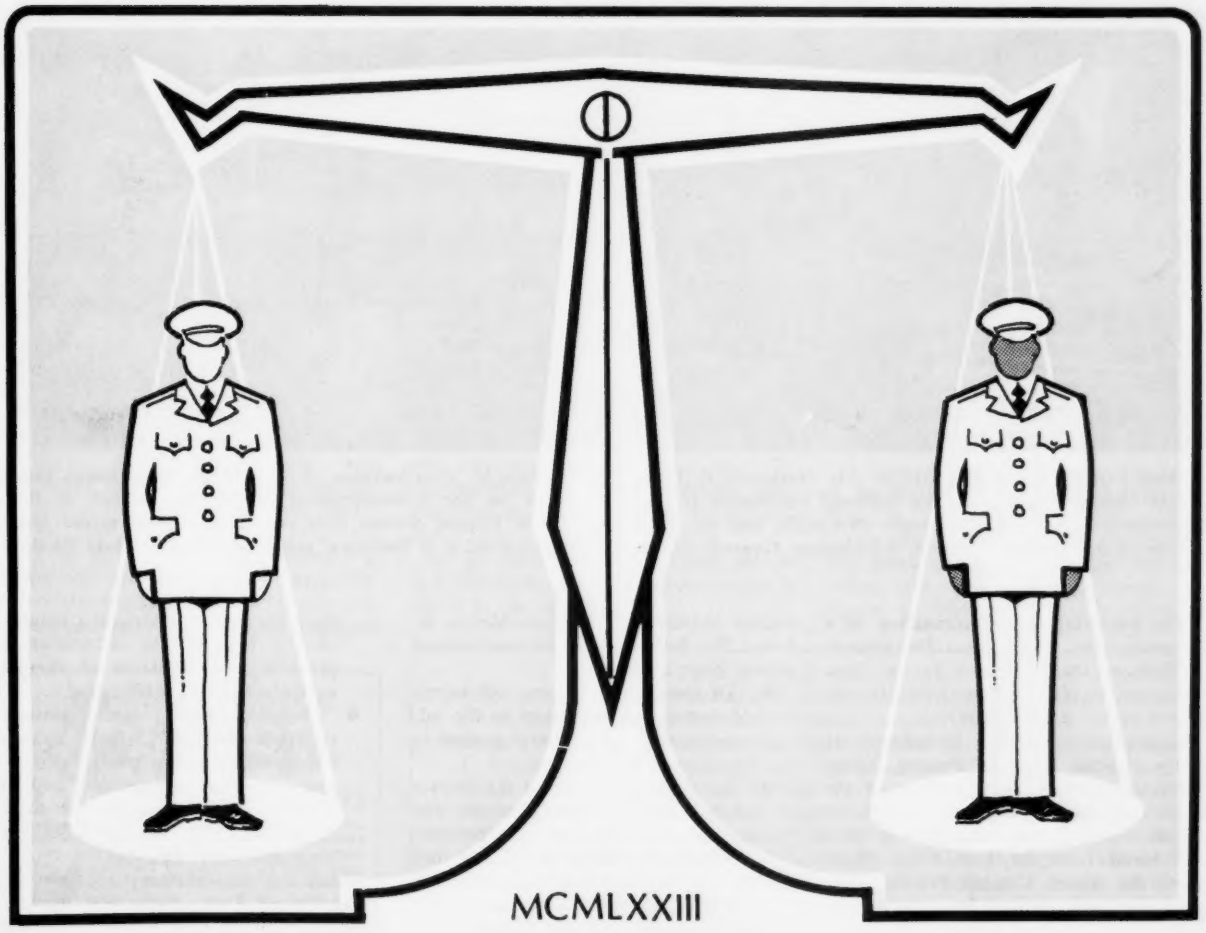
COMMANDER'S DIGEST

Military Justice Task Force Report

MARCH 22, 1973



DISCRIMINATION DEFINED —pg. 8

Military Justice Task Force Report

TASK FORCE CO-CHAIRMEN—Mr. Nathaniel R. Jones (left), General Counsel for the National Association for the Advancement of Colored People (NAACP), and the First Army Commanding General, Lieutenant General C. E. Hutchin Jr., Co-Chairmen of the Defense Department Task Force on the Administration of Military Justice in the Armed Forces, discuss their report with news media representatives at a Pentagon press conference. (DoD Photo)

The following is a condensation of a comprehensive four-volume Department of Defense study, *Report of the Task Force on the Administration of Military Justice in the Armed Forces.*

COMMANDERS DIGEST **is indebted to Army Captain John R. Prosser, Judge Advocate General Corps, Office of the Deputy Assistant Secretary of Defense (Equal Opportunity), who served as a staff member for the Task Force which wrote the report. Captain Prosser organized the main points for presentation here.**

* * * * *

The Task Force on the Administration of Military Justice in the Armed Forces was commissioned on April 5, 1972, by former Secretary of Defense Melvin R. Laird. The Secretary of Defense outlined several basic objectives:

- "To identify the nature and extent of racial discrimination in the administration of military justice in the Armed Forces;
- "To identify and assess the impact of factors contributing to the disparity in punishment rates between racially identifiable groups, as they relate to circumstances, prior to entry to active duty and post-entry environment and conditions;
- "To identify and assess the impact of racially related patterns or practices, reflecting adversely upon the fair administration of justice or respect for the law (particular emphasis will be given to circumstances preceding the initiation of charges against the individual); and
- "To make such recommendations to the Secretary of Defense, as may be deemed appropriate, to eliminate existing deficiencies and/or enhance the opportunity for equal justice for every American Serviceman and Servicewoman."

What led the Secretary to form the Task Force? First, there was growing general evidence that minority Service personnel were experiencing difficulties with the military justice system and were dissatisfied with it. Second, prior Department of Defense studies and reports

TASK FORCE MEMBERS—Donald L. Miller (left), former Deputy Assistant Secretary of Defense (Equal Opportunity), and Nathaniel R. Jones, General Counsel for the National Association for the Advancement of Colored People, (NAACP), chat with newsmen at a Pentagon news conference on Military Justice in the Armed Forces. (DoD Photo)

indicated such dissatisfaction to be the case. Third, the National Association for the Advancement of Colored People (NAACP) report on the problems of the Negro Serviceman in the European Command highlighted racial difficulties with military justice in that military theater.

The question of racial discrimination in the administration of military justice in the Armed Forces required a thorough and impartial examination. The Secretary of Defense, in an effort to achieve such a critical analysis, appointed nine civilian and five military members to serve on the Task Force.

The Task Force met for eight months and collected a massive amount of statistical data on military justice in all the Services. Members visited many installations, interviewing hundreds of Service personnel from all ranks and occupational specialties. They talked with "experts" in military justice—judges, lawyers, scholars and prisoners. They heard testimony from eminent men on the legal intracies of the military justice system. And they sampled attitudes and opinions of Service members in a special survey.

Finally, they exercised their own knowledge and expertise to analyze and examine what they had seen and heard.

The Task Force made a concerted effort to arrive at recommendations to which all members could subscribe. Much discussion, debate and give-and-take took place. As could be expected in committee endeavors, not all members agreed with all the findings and recommendations, notwithstanding their deliberate efforts to come to agreement. The Honorable C. Stanley Blair, Army Major General George S. Prugh, Navy Rear Admiral Merlin H. Staring, and the Honorable James V. Bennett joined together in a separate addendum setting forth their positions. Marine Brigadier General Clyde R. Mann set forth his views in his own addendum. The addenda, while differing from the majority's rationale for the recommendations, substantially supported the final recommendations. Thus, while both minority and majority disagreed about why the recommendations should be made, there was little disagreement about the recommendations themselves.

In its report, the Task Force identified two types of racial discrimination it found in the military.

The first, **intentional** discrimination, the Task Force defined as "a policy of an authority—especially in the context of our study, a military authority—or action of an individual or group of individuals which is intended to have a negative effect on minority individuals or groups without having such an effect on others."

The second, **systemic** discrimination, the Task Force defined as "policies or practices which appear to be neutral in their effect on minority individuals or groups but which have the effect of disproportionately impacting upon them in negative or harmful ways."

Intentional discrimination is the form of discrimination which is most familiar. What is meant by systemic discrimination may require further explanation. The understanding of systemic discrimination, the Task Force believed, was crucial to understanding the military's

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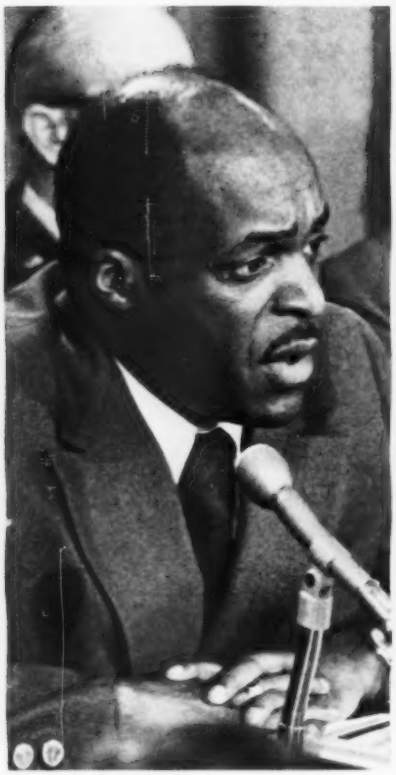
TASK FORCE MEMBERS

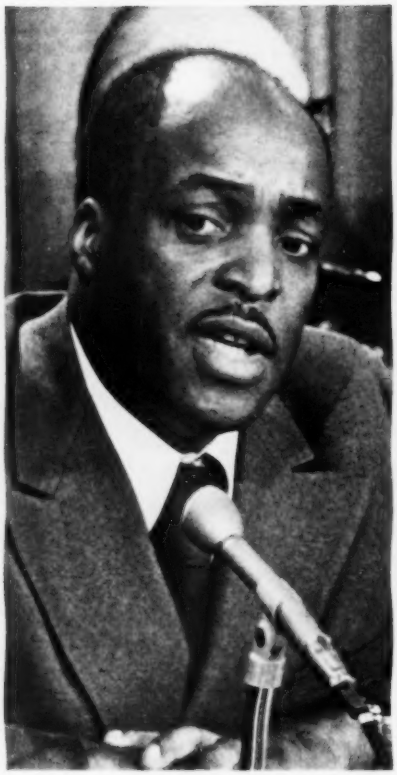
Co-Chairmen: Lieutenant General C. E. Hutchin Jr., Commanding General, First Army; Nathaniel R. Jones, General Counsel, NAACP.

Members: James V. Bennett, former Director, U.S. Bureau of Prisons; Judge C. Stanley Blair, U.S. District Court (Maryland District); Judge John Carro, Judge of the Criminal Court in New York City; W. Haywood Burns, Director, National Conference of Black Lawyers; Major General James S. Cheney, Judge Advocate General of the Air Force, Jean J. Couturier, Executive Director, National Civil Service League; Adolph Holmes, National Urban League; Joseph C. Howard, Chairman, Judicial Council of the National Bar Association; Patricia Ann King, Office of Civil Rights, Department of Health, Education, and Welfare; Major General George S. Prugh, Judge Advocate General of the Army; Rear Admiral Merlin H. Staring, Judge Advocate General of the Navy; Brigadier General Clyde R. Mann, Director, Judge Advocate Division, Marine Corps.



Task Force Co-Chairman Nathaniel R. Jones . . .

". . . We recommend a number of changes in the entire structure of military justice in terms of how court members are selected. We are recommending random selection of court members or juries, for instance. We are trying to eliminate command influence and the appearance of command influence. We recommend the inclusion of more minorities in the whole military justice pipeline so there will be a greater credibility and people will believe that they are receiving a fair treatment. . . ."



General Counsel for The NAACP . . .

". . . On the matter of the question of discrimination, the causes of discrimination, the Task Force concluded that there was discrimination and we think all members feel there was discrimination. There may be a difference of opinion as to definition as to whether it is systemic; how extensive it is. There may be other factors that impact upon military justice, but the Task Force itself considers that racial discrimination is a major factor. . . ."

discusses report during Pentagon news conference.

". . . With respect to pre-trial confinement, the statistics will show that a disproportionate number of blacks are placed in confinement on a pre-trial basis as compared to whites. That a disproportionately high percentage of blacks wind up receiving some sort of disciplinary action as a result of this, flowing from pre-trial confinements, as compared to whites—the percentage of Article 15s that are imposed, non-judicial punishments, that are meted out. . . ."

inability, in spite of its significant attempts, to eradicate racial discrimination. Systemic discrimination is not identified so much as an act as it is by the result, or effect, of an act or failure to act. Systemic discrimination describes a condition. It may be a policy which might appear neutral, yet which operates disproportionately in harmful ways on minorities. Examples of systemic discrimination cited by the Task Force include military testing policies, job-assignment policies, promotion policies, and human relations or equal opportunity policies of the several Services.

The Task Force reported, "The network of effect is as easy to state as it is hard to live with for the many who must live with it. For many, though not all, it means that a black, Chicano, Puerto Rican, or other minority man or woman comes into the Service and is given batteries of tests which, we suspect, do a poor job of measuring his basic intelligence and an even worse job of establishing his natural aptitudes. Partly on the basis of those tests, he is given an assignment in which his chances of either rising in the military profession or securing marketable skills to support

himself on return to civilian life are markedly reduced. Then, for the period of his service, the human relations program, which is intended to ease his way through an admittedly difficult and demanding system, proves in many, but not all, cases to be more rhetorical than real."

The Task Force next examined and discussed the statistical data relating to the alleged punishment rate disparity. Their studies covered incident reports, short-term AWOLs, Article 15 punishments, pretrial confinements, courts-martial, Service correctional facilities, and administrative discharges. While too voluminous to specify in full detail, the statistical data demonstrated there is a clearly discernible disparity in disciplinary rates between black and white Servicemen.

The Task Force attributed the disparities to both pre-Service and in-Service factors. Chief among pre-Service factors were racism and its by-products, educational and economic disadvantages. Chief in-Service factors were those examples of systemic discrimination previously mentioned.

In an effort to combat the conditions which it identified, the Task Force made several recommendations:

- The injection of procedures providing due process during nonjudicial proceedings;
- The eventual abolition of the summary court-martial;
- The increase of the authority of the military judge to include suspension and deferment of sentences;
- The placement of defense counsel under the immediate direction of the legal branches of the various Services;
- The random selection of court members;
- Additional peremptory challenges, with the defense having a greater number than the prosecution;
- Elimination of automatic review, except for a clemency review, by the convening authority, and appellate review of those cases appealed by the accused;
- Enactment of a specific article banning discrimination;
- Codification as specific articles of those offenses currently tried under the first two clauses of Article 134; and
- An increase in military justice training.

The Task Force also recommended significant changes to the administrative discharge procedure, equal opportunity programs, re-evaluation of Service aptitude tests and job assignments procedures, and a revision of racial and ethnic codes to include "Americans of Spanish Descent."

Of particular interest to commanders should be the Task Force recommendations concerning nonjudicial punishment procedures and military justice training.

With respect to nonjudicial punishment, the Task Force recommended that:

The consensus among junior enlisted men is that acceptance of an Article 15 is tantamount to pleading guilty. However, when looking at the responses of officer personnel assigned the task of administering non-judicial punishment, a reverse trend is evident.

Do You Consider the Acceptance of Article 15 to be the Same as a Guilty Plea?
(BASE: Familiar with Article 15 Punishment)

	Junior Enlisted	Senior Enlisted	Junior Officer	Senior Officer
BASE:	(451)	(320)	(307)	(162)
YES	58%	49%	37%	33%
NO	34%	45%	54%	65%
DON'T KNOW	8%	6%	9%	2%

PRETRIAL CONFINEMENT
All-Service Summary
January 1-31, 1972

		Caucasian		Negro		Spanish Surnamed American		American Indian		Mongolian		Malayan		Unknown		Total	
	DISPOSITION	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
I	Trial by Court-Martial	195	26.8	92	38.2	22	31.0	5	35.7	1	33.3	4	44.4	16	22.9	335	29.5
II	Discharge in Lieu of Trial	189	26.0	53	22.0	30	42.3	7	50.0	1	33.3	2	22.2	21	30.0	303	26.7
III	Other Administrative Discharge	15	2.1	17	7.1	3	4.2	2	14.3	1	33.3			2	2.9	40	3.5
IV	Release with Subsequent Trial	24	3.3	10	4.1	3	4.2					2	22.2			39	3.4
V	Release with Subsequent Article 15 Punishment	23	3.2	8	3.3	2	2.8							1	1.4	34	3.0
VI	Release without Subsequent Trial or Article 15 Punishment	243*	33.4	34	14.1	6	8.5							15	21.4	298	26.2
VII	Other	16	2.2	12	5.0	4	5.6					1	11.1	11	15.7	44	3.9
VIII	Unknown	23	3.2	15	6.2	1	1.4							4	5.7	43	3.8
	TOTAL (% by Race)	728	64.1	241	21.2	71	6.3	14	1.2	3	0.3	9	0.8	70	6.2	1136	100.0
	Average Days Confinement	29.9		34.5		29.8		33.2		17.3		20.1		17.3		30.2	

* Includes one Caucasian, Service Unknown

- Commanders utilize normal aspects of command, such as counseling, administrative admonitions, reprimands, criticisms, censures, and the administrative withholding of privileges, to ensure that all preliminary rehabilitative measures have been exhausted prior to the imposition of punishment under Article 15;
- Nonjudicial punishment procedures be standardized among the Services, insofar as practicable;
- A Serviceman have the right to obtain the advice of legally-qualified military counsel before deciding whether to demand trial in lieu of nonjudicial punishment (except in those situations when the exigencies of the Service limit the availability of counsel);
- The individual receive a personal hearing before the commander contemplating the imposition of punishment, except when prevented by the exigencies of the Service;
- A person at an Article 15 hearing have the right to be accompanied by an available representative, who may but need not be a lawyer, to advise him and to make a statement on his behalf;
- All Article 15 hearings be open to spectators, except where security interests dictate otherwise, but that the individual have the right to confer privately with the commander imposing punishment, to relate matters of a personal nature;
- When there are controverted questions of fact, witnesses be called if present on the same ship, camp, station, or otherwise available;
- Forfeitures of pay and reduction in grade not be imposed at a single Article 15 action since both carry a loss of income; commanders take into consideration the effect which any monetary loss will have upon the offender and his family; commanders who impose a reduction in grade upon a first offender as a part of nonjudicial punishment, and who do not suspend the reduction, state for the record their reasons for not doing so; and the increased use of correctional custody as a form of nonjudicial punishment be encouraged, with the necessary funding for manpower and facilities being provided;
- Punishment under Article 15 be stayed upon the filing of an appeal, provided the appeal is made at time of imposition of punishment or within a reasonable time thereafter;
- Every person receiving nonjudicial punishment be properly advised of his right to appeal from imposition of the punishment and the length of time an Article 15 remains in the individual's field personnel file be standardized; and
- Periodic monitoring of the administration of nonjudicial punishment be provided.

Court-Martial Study
Pleas and Findings
Army—All Courts

	Plea				Findings						
	Guilty		Not Guilty		Guilty		Not Guilty			Dismissed	
	#	%A	#	%A	#	%A	#	%A	%B	#	%	Total
White	181	66.5	91	33.5	248	91.2	20	7.4	22.0	4	1.5	272
Black	99	52.4	90	47.6	144	76.2	43	22.8	47.8	2	1.1	189
Spanish Surnamed	41	83.7	8	16.3	47	95.9	2	4.1	25.0	0	—	49
Other and Unknown	2	40.0	3	60.0	5	100.0	0	—	—	0	—	5
Total	323	62.7	192	37.3	444	86.2	65	12.6	33.9	6	1.2	515

%A—Perecentage of all offenses tried, same race.
%B—Percentage of all offenses to which plea of Not Guilty was entered, same race.

In its discussion on nonjudicial punishment the Task Force said, "Punishment without resort to the judicial process of the military justice system is permitted through the use of Article 15 of the Uniform Code of Military Justice. Article 15 provides commanders the means to punish for minor offenses and infractions of discipline and allows them fairly wide latitude and discretion."

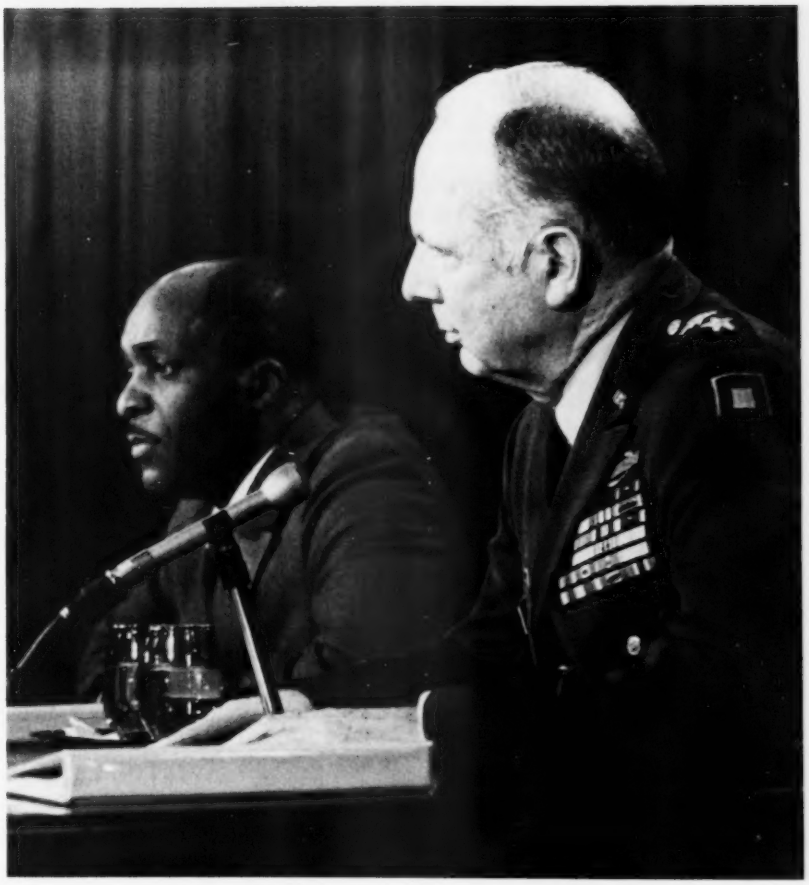
In that regard, the Task Force noted, "this discretionary area provides the greatest opportunity for the practice of racial discrimination. Many blacks feel —and our statistics confirm—that they receive nonjudicial punishment disproportionate to their numbers in the military.

"Our concern with Article 15, or nonjudicial punishment, falls generally into four broad areas: lack of uniformity among and within the Services in its use and review of its use; inappropriateness of some punishments; under-utilization of alternative measures which might obviate the need for nonjudicial punishment; and the breadth of discretion."

By standardizing procedures, not punishments, uniformity of process would be achieved, thus maximizing a Serviceman's knowledge of how Article 15 should be administered while minimizing the perception of or opportunity for unfairness in the use of Article 15. The Article 15 procedure that the Task Force envisions grants a mandatory personal hearing, open to spectators, before the commander imposing punishment, with the right to call witnesses. The person receiving punishment would have the

SHORT-TERM AWOL STUDY
ARMY SHORT-TERM AWOLs (1-3 DAYS) BY RACE AND DISPOSITION

	No Action		Counseling		Art. 15		Court-Martial		Admin. Action		Pending		Unknown		Total
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	
White	34	9.9	50	14.5	217	63.1	6	1.7	11	3.2	24	7.0	2	.6	344
Black	13	8.6	19	12.5	109	71.7	1	.7	5	3.3	5	3.3	0		152
Spanish Surnamed	0		6	21.4	18	64.3	0		1	3.6	3	10.7	0		28
Other and Unknown	8	36.4	1	4.5	11	50.0	0	4.5	1	4.5	0		0		22
Total	54	9.9	77	14.1	355	65.0	8	1.5	18	3.3	32	5.9	2	.4	546



ANSWERING QUESTIONS—NAACP General Counsel Nathaniel R. Jones (left) and the First Army Commanding General, Lieutenant General C. E. Hutchin Jr., Co-Chairmen of the DoD Task Force on the Administration of Military Justice in the Armed Forces, respond to questions posed by newsmen at a Pentagon press conference. (DoD Photo)

right to consult with legally qualified military counsel prior to deciding whether to accept Article 15 and also have the right to be accompanied by a personal representative who could speak for him. These changes would underscore the notion that the commander is an understanding person who seeks fairness, as well as punishment, when imposing Article 15.

The Task Force also encouraged alternative means of obviating the need for formal nonjudicial punishment, such as counseling an individual to discover the true source of poor behavior, or imposing censures or reprimands.

With respect to military justice training, the Task Force recommended:

- A more meaningful and effective orientation program concerning the military environment, its laws, practices and differences from most civilian environments be provided early in the enlistment of every Service member;
- Necessary measures be taken to increase, standardize and make more meaningful, military justice training by including periodic uniform refresher courses of instruction in military justice; such courses to be given to all Servicemen, including personnel who administer the military justice system, ROTC cadets, cadets and midshipmen at the Service academies, and Officer Candidate School students.

The Task Force found that the average Serviceman, enlisted and officer, is not as knowledgeable as he should be about military justice; indeed, he is woefully ignorant. An example of startling proportions concerns Article 15. An attitudinal survey revealed that approximately two-thirds of all enlisted men surveyed erroneously thought that accepting an Article 15 was an admission of guilt. Even more surprising was the fact that almost one-third of the senior officers surveyed *also* erroneously thought that accepting an Article 15 was an admission of guilt. More emphasis must be laid on acquainting all Service personnel on exactly what the rules are and how they are enforced and applied. The Task Force believed that a major effort could be made toward eliminating some of the military justice problems if better, more effective training was undertaken. The spirit of the recommendations, however, provides an immediate lesson for the wise commander. Increased efforts can be made to insure total fairness and complete understanding concerning Article 15 procedure and punishment, and greater emphasis can be placed on meaningful and effective military justice training.

The Task Force report has produced some positive results already. The Department of Defense and the Military Services have taken—or are now taking—initiatives concerning various subjects mentioned in the Task Force's recommendations.

- Pursuant to the Defense Secretary's guidance to the Services to institutionalize equal opportunity and develop affirmative action plans, the Services are now staffing for Equal Opportunity/Human Relations positions by authorizing spaces for those positions on their respective manning documents. Additionally, Equal Opportunity/Human Relations instruction has been directed by DoD, requiring a minimum of 18 hours annually for all personnel.
- The re-evaluation of aptitude tests is now being addressed as a priority research project by DoD, and there is and has been a continuing effort by the Services to assign jobs based on aptitude and interest along with Service requirements.
- Racial and ethnic identifiers are being updated. There will now be three major racial categories and, in addition, several ethnic categories, including Spanish-American, Puerto Rican, and Mexican-Ameri-

Report Defines Types of Discrimination

Intentional Discrimination—*A policy of an authority—especially in the context of our study a military authority—or action of an individual or group of individuals which is intended to have a negative effect on minority individuals or groups without having such an effect on others.*

Systemic Discrimination—*Policies or practices which appear to be neutral in their effect on minority individuals or groups but which have the effect of disproportionately impacting upon them in negative or harmful ways.*

can. The reporting of this data is now required in terms of promotions, job assignments and administrative discharges. And perhaps even more importantly, on January 11, 1973, in response to the Task Force report, former Secretary of Defense Laird, directed the Military Departments to take certain initial steps, including:

- Approval of a Department of the Army plan providing for formal recognition of 2,012 equal opportunity manpower spaces. The new organizational structure will be headed by a brigadier general who would have staff responsibility for implementing the objectives of the Secretary's Human Goals Program.
- Submission of plans by the Military Departments to revise the structure of the Judge Advocate organizations and place defense counsel under the authority of the Judge Advocate General, and, in the case of the Marine Corps, under the Director, Judge Advocate Division.
- Revision by the Military Departments of procedures for nonjudicial punishment (Article 15, UCMJ) to require:

—The availability of adequate legal advice to an accused person prior to action by commanders authorized to impose punishment;

—The opportunity for full presentation by an accused person of the case in the presence of his or her commander, to include, but not limited to, the right to call witnesses, present evidence and to be accompanied by a person to speak on his or her behalf;

—Each accused person to be advised of his or her right to appeal any nonjudicial punishment;

—Imposition of punishment under the nonjudicial punishment article be stayed pending completion of any appeal filed; and

—Nonjudicial punishment proceedings be opened to the public when requested by an accused except in those instances where military exigencies or security interests preclude public disclosure.

- The Military Departments were directed to revise their procedures for processing personnel for elimination from the Service with other than honorable discharge to provide the prospective dischargee with an opportunity to consult a judge advocate at the outset of the procedure for elimination.

Summary

The actions will bring significant change in the military justice system in terms of greater fairness and increased understanding on the part of all Servicemen. They are both a frank recognition of certain areas of weakness in the existing system and a bold effort to positively affect the morale and discipline of every Service member.

The Task Force observed, analyzed, criticized and recommended. It also challenged. It challenged the military to seize the initiative and turn the promise of the past into the reality of the present.

As Marine Corps Brigadier General Clyde R. Mann wrote in the closing words of his addendum, "Discrimination, real and perceived, must be eliminated. To that end, I support many of the recommendations of the Task Force. In conclusion, I solicit all who may read this report to join with us in a renewed, more dedicated effort to eliminate racial and ethnic discrimination of every kind wherever it exists."

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